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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1069

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, the defendants in Civil Actions No. 4708 and 4709 now pending in the United States District Court for the Western District of Michigan, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case[1] on December 13, 1965.

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1 *Sub. nom. Dan Smoot v. Honorable Noel P. Fox, United States District Judge for the Western District of Michigan.* The judgment was entered granting a writ of prohibition as prayed by Smoot prohibiting the District Judge from holding a hearing on costs.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix A hereto, *infra*, p. 9a. The opinion of the Sixth Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. 2a, is reported in 353 F.2d 830.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals, *infra*, p. 1a, was entered on December 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the protection of rights guaranteed by the First Amendment to the United States Constitution requires that a district judge have discretionary power to assess counsel fees and expenses as costs against a party who is found to have brought a libel action in bad faith, vexatiously, and for the oppressive purpose of stifling debate on public issues.

2. Whether as a matter of federal courts law a district judge has discretionary power in actions at law as well as in equity to assess counsel fees and expenses as costs against one who is found to have brought an action in bad faith, vexatiously, and for an oppressive purpose, and who seeks to dismiss the action on the eve of trial.

3. Whether under Rule 41(a)(2) of the Federal Rules of Civil Procedure a district judge may condition a dismissal with prejudice upon the payment of counsel fees and expenses, where the action is found to have been brought in bad faith, vexatiously, and for an oppressive purpose, and where the dismissal is sought on the eve of trial.

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution. It is printed in Appendix C hereto, *infra*, p. 26a. The statute involved is 28 U.S.C. Section 1920, 62 Stat. 955. It is printed in Appendix C hereto, *infra*, p. 26a. The rules involved are Rules 41(a) and 54(d) of the Federal Rules of Civil Procedure. Each is printed in Appendix C hereto, *infra*, p. 27a.

STATEMENT

On March 21, 1964, the respondent, a nationally known political commentator, filed two libel actions in the United States District Court for the Western District of Michigan against the petitioners, the League of Women Voters of the Grand Traverse Area of Michigan, an unincorporated, non-partisan political information group, and certain of its members, Florabelle Grosvenor, Mary Force, Margot Power, and Sara Hardy. The jurisdiction of the district court was invoked because of diversity of citizenship, Smoot being a citizen of Texas and petitioners citizens of Michigan.

The libel actions were based on statements published by the League critical of respondent's widely distributed series of television programs. These statements had charged that respondent relied on "slanted information, half-truths, innuendoes, and sometimes worse," had expressed concern over the atmosphere of hate surrounding the recent assassination of the President and the bombing of Negro churches, and had urged the League's members, and the public, to watch the programs critically. Smoot's verified complaints alleged malice and asked damages totaling one million dollars. (Ex. 1 to Petition for Writ of Prohibition and Mandamus in Docket No. 16,207.)[2] During dis-

2 The record was not paginated by the Court of Appeals, and references, therefore, will be made by title to individual items within the record. The records of proceedings in Docket No. 16,207 and 16,501 were incorporated by reference into the record in Docket No. 16,565 in respondent's Petition for Writ of Prohibition.

covery, Smoot relied on tactics of obstruction, harassment, and delay,[3] as a result of which the district court ordered him to put up security for costs, including petitioners' counsel fees.[4] On the eve of trial, after petitioners had incurred expenses and legal fees of over thirty thousand dollars preparing their defense,[5] Smoot moved to dismiss his actions with prejudice. The district court denied this motion,[6] whereupon Smoot obtained a writ of prohibition and mandamus from the Sixth Circuit Court of Appeals, directing the lower court to dismiss the actions with prejudice "subject to the payment of all court costs by the Plaintiff." *Smoot v. Fox,* 340 F.2d 301 (6th Cir. 1964).

On February 2, 1965, petitioners filed a Motion for Assessment of Costs, alleging and offering to prove that the libel actions had been brought in bad faith, vexatiously, and for the oppressive purpose of inhibiting and stifling petitioners' criticism, and asking that respondent be ordered to pay their counsel fees. (Exs. Nos. 1 and 2 to Petition for Writ of Prohibition in Docket No. 16,505.) A motion by Smoot to dismiss petitioners' Motion for Assessment of Costs was denied April 19, 1965, by the Honorable Noel P. Fox, District Judge, in an opinion concurred in by Chief

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3 Respondent was tardy in answering interrogatories, did not answer them completely, and took over a month and a half to comply with the court's order to answer further. He failed to produce almost two hundred documents which he had been ordered to produce by the court, although they were admittedly in his possession. He objected to the taking of his deposition on specious grounds. He failed to comply with the court's order that he provide defendants with an itemization of special damages. He sought a last-minute continuance. (See 36 F.R.D. 4 (W.D. Mich. 1964), *infra* p. 21a.) He moved to disqualify the district judge on admittedly insufficient grounds. He was unable to exchange a witness list at the pre-trial, and his counsel appeared at the pre-trial lacking full authority to act for him.

4 The district court's unreported opinion is printed in Appendix B hereto, *infra* p. 18a.

5 Fees of this magnitude resulted in part from the preparation of the defense of truth. By the time dismissal was sought, counsel for petitioners had interviewed witnesses in New York, Washington, D.C., Boston, Chattanooga, Tennessee, and several cities in Michigan, sifted through and organized thousands of pages of documentary exhibits, and made final scheduling of witnesses and preparation of proofs for trial. In addition, the cost of defense was materially increased due to respondent's obstructive and delaying tactics, including his refusals to comply with the district court's discovery orders and his repeated attempts to delay the progress of the action, all of which necessitated time-consuming court appearances.

6 The district court's unreported opinion is printed in Appendix B hereto, *infra,* p. 14a.

Judge Kent and Senior Judge Starr.[7] Judge Fox proceeded to set a date for a hearing on petitioners' motion.

On May 12, 1965, before any hearing was held, the Court of Appeals for the Sixth Circuit issued an order directing Judge Fox to show cause why Smoot's petition for a second writ of prohibition should not be granted, this time prohibiting a hearing on the assessment of costs. Subsequently, on December 13, 1965, the Sixth Circuit rendered its judgment granting the writ of prohibition. The court acknowledged that counsel fees as costs were allowable in equitable actions but stated that "no authority has been found or cited holding that a district court has discretion to allow attorney's fees and expenses as part of the costs in an action at law." 353 F.2d 832, *infra*, p. 5a. The court rejected all arguments based on Rule 41(a)(2) of the Federal Rules of Civil Procedure, holding that that rule allows the setting of conditions only in the case of dismissals without prejudice. As to petitioners' contention that the threat of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in proving the truth of the alleged libelous statements, the court said: "We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The Constitution does not protect libelous statements." 353 F.2d 833, *infra*, p. 6a. The court also stated that a hearing as to whether counsel fees should be assessed as costs would be equivalent to the trial of an action for malicious prosecution of a civil action, and respondent therefore would be deprived of his right to trial by jury.[8]

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7 Judge Fox invited Judges Kent and Starr to join in the consideration of the case because of its great public importance.

8 In the course of oral argument before the Court of Appeals it was established that no request had ever been made that a jury be called in for the hearing on costs, although the district court could have done so pursuant to Rule 39 of the Federal Rules of Civil Procedure, and although the district court's earlier action in granting respondent's belated motion for a jury trial, *infra*, p. 18a, indicated that such a request would have been received favorably.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the principles set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). There it was held that adequate protection of First Amendment rights requires that criticism of public officials be privileged so long as not actuated by malice. Underlying that holding were the principles that the law of libel "can claim no talismanic immunity from constitutional limitations," 376 U.S. 269, that those who would speak out on matters of public concern should not be "deterred from voicing their criticism, even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so,*" 376 U.S. 279 (emphasis added), and that the Constitution expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. 270.

The institution of a groundless libel action imposes a heavy economic burden on the defendant,[9] especially when he must rely on truth as his defense.[10] When the alleged libel is uttered during debate on public issues, it is clear that this debate will be inhibited[11] unless the defendant can, upon showing that the action was brought in bad faith, vexatiously, and for the oppressive purpose of stifling that debate, recover the expense he has incurred in preparing his defense.[12] In the present case, petitioners, in order to "win" the libel actions, incurred fees and ex-

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9 See Yankwich, *It's Libel or Contempt if You Print It,* 355-56 (1950).

10 Respondent's verified complaints alleged malice, thus forcing petitioners to rely on truth as their defense.

11 Following the institution of this action, respondent's program continued to be shown in Traverse City, but neither the League nor anyone else criticized or challenged it.

12 *The New York Times* decision does not, of itself, alleviate the burden of defense when malice is alleged. Defense counsel must consider the possibility of an adverse jury finding on that issue, bearing in mind that malice may be established by showing that the allegedly defamatory statements are untrue, and that the defamer had no reasonable grounds on which to believe them true. *Prosser, Law of Torts,* §95 (2d ed. 1955). In the present case, counsel for petitioners concluded that the only safe course of action was to be fully prepared to show truth. It was the preparation of this defense which caused most of petitioners' counsel fees.

penses of over thirty thousand dollars. To call such a victory Pyrrhic is to understate the case; bluntly put, petitioners do not have the funds to pay it and cannot afford to "win" again. Unless they can be reimbursed, petitioners will remain silent in the future, having been "deterred from voicing their criticism, even though it is in fact true, because of . . . fear of the expense of having to" prove it true.

The position urged by petitioners requires no sweeping revision of the law of libel. Indeed, the substantive law of libel is scarcely involved at all; at issue here are baseless libel actions brought in bad faith and for the purpose of muting criticism. Nor do petitioners contend that in every such case the district judge must allow full counsel fees and expenses as costs. Petitioners do urge, however, that the district judge must have discretion to allow such costs. Otherwise, the federal courts could be used with impunity to deprive groups and individuals such as petitioners of their constitutional rights. Proper judicial supervision of the administration of justice in the federal courts requires that those courts not permit themselves to be used so as to endanger the very constitutional rights they were created in part to protect.

The court of appeals told petitioners that they "have the right of free speech so long as their statements are not libelous."[13] This simplistic brushing aside of petitioners' serious constitutional claim suggests that the court of appeals either failed to understand or refused to follow the principles enunciated in *New York Times*. In either case, the pernicious effect of its holding, which permits courts of justice to be used as instruments for the intimidation of those who would speak out on public issues, must be extirpated. Petitioners seek only the right to enter again into active debate on public issues.

2. The decision below is in conflict with the principle underlying the decision of the Fourth Circuit Court of Appeals in *Bell v. School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963). There the defendant school board followed a pattern of evasion and obstruction, forcing plaintiffs to turn to the courts to secure rights clearly guaranteed

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13 353 F.2d 833, *infra*, p. 6a.

them by the Constitution. The Fourth Circuit held that in such circumstances the defendant should be required to pay the counsel fees and expenses which its wrongful actions forced the plaintiffs to incur. Here, as there, one party, acting vexatiously and in bad faith, has placed upon others such a heavy burden of litigation that unless they can be reimbursed they will be forced to avoid such litigation and thereby lose constitutionally protected rights. The sound principle of *Bell* is that the economic burden of legal action may not be used to deprive a party of constitutional rights, and that the court therefore has the power to award vexatious costs. Although *Bell* involved the rights of Negro schoolchildren to equal protection of the laws, the right to freedom of expression under the First Amendment is no less jealously to be protected. *Lamont v. Postmaster General,* 381 U.S. 301, 309 (1965) (concurring opinion).

3. This is a case of great public importance. The decision below holds that those who would criticize public commentators do so at the peril of being heavily penalized by the institution of baseless libel actions. The machinery of the courts thus becomes a potent and frightening weapon in the hands of those who would intimidate and silence the voices that disagree with them. Petitioners were prepared to show that the present action is not the only instance of Smoot's use of the law of libel in attempts to silence his critics.[14] Nor is he alone in the use of libel suits for intimidation of opponents.[15] In April, 1964, for example, at least 17 libel actions, seeking total damages in excess of 288 million dollars, and brought by public officials in three southern states against newspapers, magazines, and a television network, were pending in state and federal courts.[16]

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14 For example, counsel are aware of letters written by respondent in March, 1964 demanding retraction of certain statements made by a California radio announcer and charging that respondent considered those statements slanderous and defamatory in nature and that they were uttered with malicious intent.

15 The reecnt experience of the Santa Barbara, California, chapter of the United Nations Association is significant. The group planned a television show dealing with controversial topics. Prior to the showing they were informed that a libel action for a million dollars would be filed if the program were shown. The group withdrew the program.

16 *The New York Times,* April 4, 1964, p. 12.

The decision below, if allowed to stand, will have wide-ranging and harmful consequences. If those who speak out on public matters can inflict upon their critics a fine greater than that normally set by law for the commission of a felony merely by filing a baseless action in federal court, then such actions will find ever-increasing popularity. Large newspapers, magazines, and other such enterprises will, as Mr. Justice Black pointed out in the *New York Times* case, 376 U.S. 269, 295 (concurring opinion), be unable to afford such penalties. How much more will the League of Women Voters of the Grand Traverse Area of Michigan, and similar such groups across the country, be unable to afford them?

The timing and handling of respondent's lawsuits reveals the purpose they served. Immediately after the suits were commenced, in March of 1964, petitioners began to seek an early trial date — it was an election year, and they wanted to be free to answer respondent on election issues. But Smoot's delaying and obstructive tactics dragged the case on into autumn. During the pendency of the suit, petitioners were almost completely silenced, while Dan Smoot went on, week after week, uninterrupted and free of critical response. The threat posed by the Sixth Circuit's holding in this case to that free and open discussion which necessarily underlies the democratic process must not be left unanswered.

In considering the public importance of this case, it should not be overlooked that the court of appeals has twice granted the extraordinary writ of prohibition. Furthermore, at the district court level, Senior Judge Starr and Chief Judge Kent deemed the case so important that they joined Judge Fox in ruling that a district judge did have the power to allow counsel fees as costs. At least six judges, then, have viewed this case as one of great public impact, involving questions which must be resolved promptly and with finality.[17]

It is also significant that dozens of organizations across the country have followed the course of this litigation closely. In particular, the groups who had planned to

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17 Of the six, three have ruled in petitioners' favor, and three against them.

send witnesses on the League's behalf[18] have all evidenced keen interest in the outcome of this case. The reason for their concern is apparent. If petitioners are not successful, then such organizations will be unable to answer their critics; they must remain silent in a one-sided debate. Free speech will have become a luxury available only to those who can afford to defend the baseless libel actions that will result from its exercise.

4. The decision below introduces an unwarranted law-equity distinction into federal civil procedure, which must not be allowed to stand. The court of appeals conceded,[19] in the face of overwhelming authority,[20] that counsel fees may be awarded as costs in actions in equity which are found to have been brought in bad faith, vexatiously, and for an oppressive purpose. However, it held that, despite the merger of law and equity in federal practice, such an award could not be made in actions at law. The court reasoned as follows:

> "We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit."[21]

Rule 54(d) of the Federal Rules of Civil Procedure vests the power to allow costs in federal district courts. It provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *." The Rule makes no distinction between actions at law and suits in equity, and commentators agree that under it the historic

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18 The following groups, among others, had witnesses ready to appear at the trial of the libel actions, and have followed the litigation closely from its inception: Committee for Economic Development; National Education Association; Tennessee Valley Authority; N.A.A.C.P.; National Municipal League; United Nations Association.

19 353 F.2d 832, *infra*, p. 4a.

20 See cases cited in Petitioners' Brief in Opposition to Petition for Writ of Prohibition in Docket No. 16,565.

21 353 F.2d 832 n.1, *infra*, p. 5a n.1.

power to allow counsel fees as costs is available in all actions.[22]

If, as the court of appeals deems so significant, there is no appellate authority allowing counsel fees as costs in an action at law, neither is there authority denying such costs because they are requested in an action at law. And the asserted distinction flies in the face of sense and reason. In the present day and age, the allowance or disallowance of attorneys' fees should not turn on whether a litigant in the time of Henry VIII would have brought such a case to the Lord Chancellor or to the Court of Common Pleas. The need to compensate defendants wrongfully brought into court, and the desirability of penalizing vexatious plaintiffs, are just as pressing when the complaint has sought money damages as when it prays injunctive relief. In *Universal Oil Products v. Root*, 328 U.S. 575 (1946), the Court said:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceeding could justly be assessed against the guilty parties. Such is precisely a situation where for 'dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

To use the language of the Court, it is the "temple of justice" which must be protected, not the "temple of justice when sitting to hear equitable causes."

If this ill-advised and unmeritorious distinction between law actions and equity suits is permitted to stand, federal district judges will be stripped in a majority of the cases before them of an effective tool for policing their courts — the discretionary imposition of extraordinary costs. Petitioners submit that the anachronism set up by the court of appeals must be eliminated now, before it further undoes that which the Federal Rules of Civil Procedure attempted to accomplish in the merger of law and equity.

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22 6 *Moore, Federal Practice*, para. 54.77(2); Note, 77 *Harv. L. Rev.* 1135, 1138 (1964).

5. The decision below unduly restricts the operation of Rule 41(a)(2) of the Federal Rules of Civil Procedure. Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule provides an additional ground upon which the court may allow counsel fees as costs, for it is well settled that such an allowance may be imposed as a condition of dismissal.[23] The court of appeals ruled, however, that Rule 41(a)(2) applies only to dismissals without prejudice.[24] Petitioners submit that the broad language of Rule 41(a)(2) should not be so limited, and that a district judge has the power, in an appropriate case, to tax counsel fees as a condition of a dismissal with prejudice.

6. The foregoing has demonstrated that the decision below was clearly incorrect. The conclusion of the court below that the taxation of counsel fees as costs would amount to an action for malicious prosecution, depriving respondent of his right to a jury trial, is without merit. As previously pointed out, respondent never requested a jury. Furthermore, an action for malicious prosecution seeks a wholly different measure of damages. Finally, the availability of the remedy of vexatious costs to safeguard the integrity of the federal courts and to protect constitutional rights cannot be made to turn on the vagaries of state law.[25] Nor does the court of appeals assert any grounds of policy to support its position.[26] The seriousness of the error

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23 2B Barron & Holtzoff, *Federal Practice and Procedure*, section 914, at 124 (Wright ed. 1961).

24 The court misread *Lawrence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963), to support its position. That case merely held that in the absence of exceptional circumstances counsel fees would not be imposed as a condition of dismissal with prejudice. In the present case, special circumstances are present.

25 It is uncertain whether an action for malicious prosecution of a civil action would lie in Michigan without the attachment of property.

26 The case of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), lends no support to the court below. There the court upheld a district judge's taxation of costs under Rule 54(d), wherein he refused to tax the full expense of transporting witnesses

below and the burden thereby imposed on petitioners by the court of appeals' decision constitute sufficient reasons for the Court to grant this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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LEWIS A. ENGMAN
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Counsel for Petitioners

Dated: February 28, 1966.

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26 (Continued)—

from Arabia to New York to the unsuccessful plaintiff. The court said "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. 235. This language is not inconsistent with petitioners' position, especially when it is borne in mind that petitioners alleged bad faith and oppressive purpose. Indeed, the last sentence quoted seems to support petitioners' contention that, in a proper case, a district judge does have discretion to tax other than the ordinary costs.

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APPENDIX A — OPINIONS BELOW

ORDER

No. 16,565

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAN SMOOT,
Petitioner,
VS.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

Upon consideration of the petition for a writ of prohibition, the answer of respondent thereto, and the briefs and arguments of counsel, it is ORDERED that a writ of prohibition be issued prohibiting the respondent from holding a hearing for the purpose of allowing as costs attorney's fees incurred by defendants in the libel actions and expenses incurred by defendants or their counsel in said libel actions; and

That respondent be and he is hereby ORDERED to compute the costs in said libel actions pursuant to the provisions of 28 U.S.C. Sec. 1920 and Rule 54 of the Federal Rules of Civil Procedure.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

OPINION

No. 16,565

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON PETITION FOR A WRIT OF PROHIBITION

DAN SMOOT,
Petitioner,
vs.
HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

Decided December 13, 1965.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. This controversy was first before this Court on the petition of Smoot for a Writ of Mandamus requiring the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, to grant petitioner's motion to dismiss with prejudice two actions for damages for libel filed by him against the League of Women Voters of the Grand Traverse Area of Michigan and certain individuals as defendants. The motion to dismiss with prejudice was filed by petitioner's present counsel after the District Judge had entered an order requiring Smoot to post $15,000 bond as security for costs. The dismissal had been resisted by the defendants in the libel actions on the theory that they were entitled to have a jury impaneled to hear their side of the case, even

though plaintiff was willing to have the actions dismissed with prejudice at his costs.

We granted the mandamus petition and ordered the District Judge to dismiss the actions with prejudice on payment of all court costs by Smoot. *Smoot v. Fox*, 340 F.2d 301 (6th Cir. 1964). Thereafter the District Judge filed an application for rehearing and clarification as to our intent in using the term "court costs", and for a ruling on whether attorney's fees and expenses could be allowed as costs in the libel actions. We denied the rehearing and declined to pass upon that question in the mandamus action.

The defendant then filed a motion in the District Court labeled "Motion For Assessment of Costs" which was for an order requiring plaintiff to pay costs to defendants in the amount of $35,000 for attorney's fees and $1,906.99 for expenses alleged to have been incurred by them during a period of about five months between the dates of the filing of the complaints in the libel actions and plaintiff's motion to dismiss with prejudice. In an affidavit in support of the motion for attorney's fees and expenses as costs, it was stated that defendants would adduce proofs—

> "to show that the statements of defendants, which are the basis of these libel actions are true and privileged and that said actions are groundless and were brought and maintained by plaintiff in bad faith vexatiously and for oppressive purposes."

The petitioner filed a motion to dismiss defendants' motion for attorney's fees and expenses on the ground that the allowance of such items as costs was not within the jurisdiction of the District Court after the dismissal with prejudice. The Court assigned both motions for hearing on the same date and requested each party to estimate the time required to present the motions. Defendants in the libel actions estimated it would take ten days' time to present evidence on their motion.

Before the hearing date petitioner filed a petition for a writ of prohibition in this Court to prevent the District Court from holding a hearing on the motion for allowance of attorney's fees and expenses. We denied that petition

on the ground that the District Court had jurisdiction to hear and determine both motions. Our denial was based on the assumption that the District Court would not order the allowance of costs which were not authorized by the Federal statutes and rules, and on the further assumption that the Court would allow petitioner adequate time to prepare for the hearing on defendants' motion to assess costs after ruling on petitioner's motion to dismiss.

The District Judge denied petitioner's motion to dismiss defendants' motion to allow attorney's fees as costs and refused to certify the question for an interlocutory appeal to this Court. In denying petitioner's motion the District Judge indicated that he had previously decided that attorney's fees could be proper items of costs in certain cases, and that they could possibly be an item of costs in this case. He set a hearing for May 17, 1965 to determine defendants' motion for the allowance of attorney's fees and expenses. The petitioner then filed the present proceeding in prohibition in this Court.

We thought our opinion in the mandamus action made it clear that the dismissal with prejudice precluded a trial on the merits of the libel actions. 340 F.2d 301. Yet this is precisely what the defendants are attempting to have in their motion to assess costs, for they propose to prove that the alleged libelous statements set forth in the complaints were true and privileged and that the actions were groundless. Such an evasion of our order cannot be tolerated.

In essence, defendants would convert a proceeding to assess costs into an action for damages for malicious prosecution of a civil action, and have the Court, instead of a jury, award the damages.

Respondent asserts that the allowance of attorney's fees and expenses for preparation for trial as costs, is a matter properly within his discretion as District Judge. In our opinion the allowance of such items is within the discretion of the District Court in equity cases where exceptional circumstances call for their allowance in order to do justice between the parties. *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951). Attorney's fees are also allowable where they are specifically authorized by statute

or provided for by agreement between the parties. *Local Union 984, Internat'l Bro. of Teamsters, etc. v. Humko Co.*, 287 F.2d 231 (6th Cir. 1961), cert. denied 366 U.S. 962.

However, no authority has been found or cited holding that a District Court has discretion to allow attorney's fees and expenses as part of the costs in an action at law.[1] On the contrary, in *Ruck v. Spray Cotton Mills, Inc.*, 120 F.Supp. 944, 947 (M.D. N.C. 1954), the Court stated:

> "Costs in actions at law in the United States Courts are creatures of the statute. There [is no] Federal Statute permitting District Courts to tax attorney fees as costs in actions at law as distinguished from suits in equity."

And in *Kramer v. Jarvis*, 86 F.Supp. 743, 744 (D. Neb. 1949), the Court stated that "except where it is otherwise provided by statute or rule, attorney's fees are not taxable as costs in actions at law pending in federal district courts." To the same effect see *United States v. Hoffman Const. Co.*, 163 F.Supp. 296 (E.D. Wash. 1958).

To hold otherwise would permit a Federal Court to allow attorney's fees and expenses as costs in a suit for damages for personal injury, assault and battery, or in any other type of action at law which the Court might feel was brought maliciously and without probable cause. This would have the effect of deterring the pursuit of legal remedies in the Federal Courts, which is contrary to the American system of jurisprudence. It would vest unnecessary and unwarranted power in the Court. It would practically dispense with actions in the Federal Courts for damages for malicious prosecution of civil actions.

Respondent contends that Rule 41(a)(2) of the Federal Rules of Civil Procedure permits a District Court to fix attorney's fees as costs. That rule provides that "an

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1 We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit.

28 U.S.C. § 1920 provides for the type of costs which may be allowed by the court. See also Rule 54 Fed.R.Civ.P.

action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court may deem proper."

The cases permit allowance of attorney's fees against the dismissing party where the action is dismissed without prejudice. *E.g., Welter v. E. I. DuPont de Nemours & Co.*, 1 F.R.D. 551 (D. Minn. 1941). The reasoning behind the rule where the action is dismissed without prejudice is to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum. See 5 Moore's §§41.05, 06. A dismissal with prejudice, however, finally terminates the cause and the defendant cannot be made to defend again. The Court in *Lawrence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963) rejected the contention that there is no requirement in the Rule that limits it to dismissals without prejudice, and held that attorney's fees are not proper where the dismissal is with prejudice.

Respondent contends that defendant's First Amendment right of free expression will be violated if attorney's fees and expenses are not allowed. Reliance was placed on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in urging that the pendency of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in preparing to prove the truth of the alleged libelous statements. We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The constitution does not protect libelous statements. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

Although the Supreme Court held that these cases did not foreclose its inquiry into the *Sullivan case*, because they did not sustain the use of libel laws to prohibit expression critical of public officials, the Court did not repudiate the cases or the principle. The First Amendment does not require that a person who is sued for libel be guaranteed the cost of defending himself.

On the other hand, the allowance of attorney's fees and expenses here would, in our opinion, violate petitioner's

Constitutional right to a jury trial. The District Court would necessarily have to determine whether the alleged libelous statements were true and privileged and that the actions for damages were brought in bad faith, vexatiously and for oppressive purposes. This would be a hearing to determine if Smoot was liable for malicious prosecution of a civil action, and if so, to render a judgment against him for damages under the guise of fixing costs. The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. An action for malicious prosecution falls well within the recognized forms of action at common law. 5 Moore's Federal Practice 2d Ed. §38.11 [5], p. 114.

Although no question has been raised over our jurisdiction, we are of the opinion that power was conferred upon us to entertain the proceeding in prohibition by the All Writs Statute, 28 U.S.C. §1651. 6 Moore's Federal Practice 2d Ed. §54.10[2], pp. 65, 66. Whether such power should be exercised rests within the sound discretion of the Court. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *Ex Parte Peru*, 318 U.S. 578 (1942).

We think this is the type of extraordinary case in which an Appellate Court should exercise its discretion in favor of the granting of the writ. By so doing the parties will be saved the cost and expense of an unnecessary trial to determine an issue which does not exist in this case. It will conserve the time of the Court, which could be devoted better to other meritorious cases requiring judicial attention in the congested Districts of Michigan.

One other matter requires comment and that is the order of the District Court requiring the plaintiff in the libel actions to post bond in the amount of $15,000. The purpose of such a large bond was unquestionably to provide security for the allowance of attorney's fees and expenses.

In the present case after we had ordered the dismissal with prejudice of the libel actions, the District Court at that late date attempted to require the plaintiff in the libel actions to post the $15,000-bond as a condition prece-

dent to granting him a pretrial conference on the assessment of costs.[2]

Since the District Judge was without right in an action at law to allow attorney's fees and expenses as part of the costs, it follows that he had no authority to require the posting of a bond as security for their payment. *McClure v. Borne Chemical Co.*, 292 F.2d 824, 835 (4th Cir. 1961).

A writ of prohibition may issue as prayed for in the petition.

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2 "The Court: Mr. Watts, do you intend to comply with the Court's order requiring you to post a bond of Fifteen Thousand Dollars?

Mr. Watts: No, Sir, we do not intend to comply with the bond.

The Court: When you comply with that we will move ahead with further proceedings, as far as a pretrial is concerned.

Mr. Watts: Let me understand, until and unless Smoot files a bond, — how could he file a bond in a case that has been dismissed?

The Court: Well, as a matter of curiosity, I think in the experience you have had, Mr. Watts, you can answer that yourself, the question of costs, the bond, the order requiring the posting of the bond hasn't been dismissed and the Circuit Court of Appeals has clearly recognized that the question of costs is still before the District Court and that answers itself.

Mr. Watts: Then, as I understand the Court's ruling, until and unless we post a bond, there will be nothing further in the nature of —

The Court: — of a pretrial or any conference of that kind but that doesn't change the hearing date . . ."

OPINION ON PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' MOTION FOR ASSESSMENT OF COSTS AND MOTION TO STRIKE FROM TRIAL DOCKET

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

On August 28, 1964, defendants filed a motion for security for costs, with supporting brief alleging that the plaintiff had brought and maintained these actions in bad faith and for vexatious and oppressive reasons, and offered evidence in support of that position. Defendants claimed that at the conclusion of the case these facts would be more apparent, and for that reason requested that plaintiff be ordered to post a security bond.

At a hearing on September 25, 1964, the court considered the evidence before it, found substantial basis to grant defendants' motion, and on October 2, 1964 an order was entered requiring plaintiff to post with the Clerk of the Court by October 8, 1964 a bond of $15,000.

On February 2, 1965, defendants filed a motion for assessment of costs, including attorney fees and other ex-

penses, in which they again claimed that plaintiff had commenced and maintained these actions in bad faith, vexatiously, and for the purpose of harassing defendants.

Plaintiff's motion to dismiss defendants' motion for assessment of extraordinary costs, by its nature and circumstances in this case, raises two questions:

First, does the district court have jurisdiction to entertain defendants' motion, and

Second, is there presently before the district court sufficient material to require a hearing on defendants' motion?

Each of these questions must be answered in the affirmative.

The first question is answered by the Circuit Court of Appeals in its order of April 7, 1965, when it said at page 3:

> "The District Court has jurisdiction to hear and determine both of the motions which were filed in these actions. Title 18 U.S.C. §1920 and Rule 54 of the Federal Rules of Civil Procedure provide for the allowance of costs. The District Judge will be required upon hearing to determine what items are properly allowable for costs under the statutes and rules."

The second question likewise must be answered in the affirmative. By order of the Sixth Circuit Court of Appeals dated December 30, 1964, these actions were ordered to be dismissed with prejudice, subject to the payment "of all court costs" by the plaintiff.

Uncertain as to the effect of this language on the pending motion for security for costs, a petition for rehearing and clarification was submitted to the Court of Appeals, in which it was pointed out that petitioner (District Judge Noel P. Fox) had previously decided that attorney fees could be proper items of cost in certain cases.

The petition sought a clarification of the term "court costs," recognizing that attorney fees might have been excluded as possible items of cost by the order of the Circuit Court of Appeals.

The petition for rehearing was denied, but the order so denying stated that in using the term "court costs," the Circuit Court of Appeals had made no ruling on the question of whether or not attorney fees were properly assessable in these cases.

When this court determined that defendants' motion for security for costs had sufficient merit to require posting of a bond, it decided that in this case attorney fees could possibly be items of cost. This decision was reached after considering briefs and oral argument for both parties, and at that time plaintiff presented the same arguments relating to items properly awardable as costs.

The cases cited in plaintiff's brief on this motion are either distinguishable or unopposed to the proposition that attorney fees are proper items of costs in certain extraordinary cases.

Fleischer v. Paramount Pictures Corporation, 329 F. 2d 424 (CCA 2, 1964), in the excerpt quoted in plaintiff's brief (page 426 of 329 F. 2d) recognizes that attorney fees may be awarded in the exceptional case.

Apple Growers Ass'n. v. Pelletti Fruit Co., 153 F.Supp. 948, held that in exceptional cases the trial judge has discretion to award attorney fees as costs.

Rolax v. Atl. Coast R. Line, 186 F. 2d 473, holds that attorney fees are not *ordinarily* items of assessment, but are more commonly so in equity actions.

Warner v. Florida Bank & Trust Co., 160 F. 2d 766, involved trust remaindermen attempting to recover attorney fees as a matter of course in a case in which they were litigating their interests in the trust fund. The court merely stated that as a general rule adverse parties to litigation are required to pay their own attorney fees. The general rule is not disputed. Defendants strongly urge upon the court that the instant case is an exceptional situation which calls for the assessment of extraordinary costs.

In re Joslyn, 224 F. 2d 223, was a bankruptcy case in which costs were expressly governed by statute, and in Rosden v. Leuthold, 274 F. 2d 747, attorney fees were disallowed because the action was brought under the District of Columbia Code, which explicitly prohibited them. Like-

wise in Tabis v. Joy Music, Inc., 204 F.Supp. 556, attorney fees were sought pursuant to statutory authority.

Farmer v. Arabian American Oil Co., 379 U.S. 227, 13 L.Ed. 2d 248 is distinguishable. It involves no claim of vexatious, oppressive, or bad faith conduct. It is an ordinary contract case involving questions of what is included in ordinary costs. However, it does set at rest the plaintiff's claim that before this court can exercise its jurisdiction in determining costs the Clerk must first tax the costs.

Plaintiff also argues that this hearing is equivalent to an action for malicious prosecution and that plaintiff is therefore being deprived of a trial by jury. It is true that many of the same elements as required in an action for malicious prosecution are essential to establish entitlement to an award of attorney fees. However, this does not automatically mean that plaintiff is being deprived of a right. The procedure for awarding of such items of costs is well established, and were plaintiff's argument to prevail, there would be no such thing as a motion for security for costs or for assessment of attorney fees and extraordinary costs, for in every such instance the party respondent would be able to assert that the proceedings were in fact an action for malicious prosecution and demand trial by jury. Such an argument is patently without merit, for even after a trial before a jury, in such a situation, the trial judge alone must reach a decision as to the propriety of awarding attorney fees by considering all the facts which have been presented.

Furthermore, on the facts of the present cases, this procedure is in accord with well-established principles. The motion was filed before plaintiff's first and second motions to dismiss, at a time when it was still expected that there would be a jury trial of these cases, at which proofs relied upon by defendants would presumably have developed.

The jurisdiction of this court to conduct a hearing on the matter of assessment of costs is recognized in the order of the Sixth Circuit Court of Appeals of April 9, 1965, denying plaintiff's petition for writ of prohibition.

This court, of course, is bound to follow the governing law as set forth under the United States Code and the Federal Rules of Civil Procedure, as interpreted by decided case law.

Reviewing plaintiff's motion, the briefs of the respective parties, all pleadings, all facts and circumstances in these cases, all orders and opinions of the Sixth Circuit Court of Appeals and this court, all of which have been carefully and fully considered by me, the presiding judge, before whom oral arguments were presented this morning, I can find no reason justifying a dismissal of defendants' motion for assessment of extraordinary costs.

Chief Judge W. Wallace Kent and Senior Judge Raymond W. Starr also reviewed and considered all matters in these cases prior to the oral arguments this morning, and they concur in this conclusion.

Therefore, plaintiff's motion to dismiss defendants' motion is hereby denied.

Dated: April 19, 1965.

(s) Noel P. Fox
District Judge

We have read and concur in this opinion.

(s) W. Wallace Kent
Chief Judge

(s) Raymond W. Starr
Senior Judge

APPENDIX B — RELATED DISTRICT COURT OPINIONS

OPINION ON MOTION TO DISMISS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This suit was commenced in March of 1964, and because of the constitutional issues involved, every effort has been made to bring the case to an early trial. By order of the court, pretrial preparations were to have been completed by August 25, 1964.

On October 2, 1964, after the court had set a trial date of October 14, and after counsel for defendants had gone to great expense in preparing for trial by enlisting as witnesses a number of individuals of national prominence, plaintiff moved to dismiss the case. Negotiations between counsel broke down when plaintiff refused to sign a statement of admission, apology and retraction, and plaintiff then submitted his motion to the discretion of the court.

Rule 41(a)(2), Federal Rules of Civil Procedure, pro-

vides for dismissal after service of an answer in a case *only* by order of the court.

This matter is entirely within the discretion of the court. See 2B Barron & Holtzoff, Federal Practice and Procedure, §912, pp. 111-112.

The Seventh Circuit case of Bolten v. General Motors, 180 F. 2d 379, represented the lone example of the belief that the right to dismiss was absolute, the discretion of the court going only to the terms and conditions of dismissal.

However, the Seventh Circuit subsequently reversed itself in Grivas v. Parmelee Transportation Co., 207 F. 2d 334, cert. denied 347 U.S. 913, 74 S.Ct. 477, 98 L.Ed. 1069, where the court stated that the matter of dismissal is not a right, and the discretion of the court in a motion to dismiss goes both to whether or not the motion shall be granted, as well as to the terms and conditions.

> "It is never a pleasant task for a court of review to overrule a previous decision upon which litigants and the District Courts of the Circuit have a right to rely, but we have reached the conclusion that our interpretation as announced in the Bolten case was too broad and that this is the time to modify it. The unanimous view of other courts and textbook writers is that the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of absolute right * * * *." Id. at 336.

See also Adney v. Mississippi Lime Co., 241 F. 2d 43.

Finally, the reasoning in Churchward Int'l. Steel Co. v. Carnegie Steel Co., 286 F. 158, is especially apropos. That was a patent case in which a motion to dismiss was denied. The Court said at Page 160:

> *"Then, too, it seems that the public has an interest in having the validity of a patent established where it is seriously questioned, because what is embraced within the patent belongs to the public and the patent itself is a grant by the public. The interest of the public appears to be greater in such controversies when they relate to manufactured products which are extensively used such as steel."* (Emphasis supplied).

A fortiori, the interest of the public in this case compels this court to a similar holding. To even attempt to say that public interest in freedom of expression is less important than the public interest in steel processes is a misconception of fundamental constitutionally protected rights.

The exercise of judicial discretion in granting motions to dismiss is proper "unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit." Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L.Ed. 849.

Familiarity with this case shows indisputably that dismissal at this stage would greatly prejudice defendants. They have been haled into court by a national figure, accused of besmirching his name and professional reputation, and made the subject of much publicity, since the complained of writing is an integral part of the public purpose for which defendants assert they are organized.

Plaintiff claims that he wishes only to vindicate his name (despite the fact that the suit was instituted for $1,000,000 in March of 1964, and has been desultorily prosecuted since then, neither of which is consistent with eagerness to cleanse one's name of undesirable association), but the circumstances of this case are such that defendants are now in the position equally of wishing to establish their good name.

Defendants, as stated, have retained able counsel, who have pursued the matter extensively and diligently, arranging for witnesses from Washington, D.C., New York, and Little Rock, Arkansas, to mention but a few — people of such importance that they have, defendants' counsel asserts, rescheduled national commitments to be able to appear at this trial. It is doubtful that this array of witnesses could be again duplicated, which means that a dismissal at this stage clearly prejudices defendants.

That such figures are willing to take part in this litigation emphasizes the public concern for the issues which plaintiff has raised by his complaint. Plaintiff has refused to settle the case on the terms requested by defendants, which amounted to a complete exoneration of their activities, and defendants now appear anxious to establish what plaintiff refuses to admit in settlement of the case.

Plaintiff has challenged defendants to a day in court, and because of the nature of this case, plaintiff's refusal to settle, and defendants' preparation, they are now entitled to that day in court.

The public interest in this case is well defined, and in the concern for that interest manifested in this court's written and oral opinions already entered in the case, I deny the motion to dismiss.

Dated: October 13, 1964.

Noel P. Fox,
District Judge.

I concur in the above opinion.

Raymond W. Starr,
Senior Judge.

Certified as a true copy:
Howard T. Ziel, Clerk,
By: G. E. Laxink,
Deputy Clerk.

OCT. 13, 1964.

OPINION ON MOTION FOR JURY TRIAL AND MOTION FOR SECURITY FOR COSTS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

Counsel for plaintiff in this case has failed to properly notify opposing counsel of plaintiff's demand for jury trial.

Failure to serve a demand in proper form and within the time specified constitutes a waiver of jury trial. Rule 38, Federal Rules of Civil Procedure. See 2B Barron & Holtzoff, Federal Practice and Procedure, §879, P. 54, and cases cited.

Furthermore, "the waiver is complete even though inadvertent and unintended, and regardless of explanation or excuse." See Barron & Holtzoff, supra, P. 55, and cases cited.

However, Rule 39(b) does provide for relief in situations of this sort at the discretion of the Court, upon motion by the waiving party.

Thus, in this case the Court is presented with a complete waiver of the right to jury trial and it is absolutely

within the discretion of the Court to grant or deny the motion requesting trial by jury.

The preponderance of authority is against granting such a motion in the absence of misunderstanding, Hargreaves v. Roxy Theatre, 1 F.R.D. 537, honest mistake, Supplies Inc. v. Aetna Casualty and Surety Co., 18 F.R.D. 226, or a good faith attempt to comply with the rules, Rogers v. Montgomery Ward & Co., 26 F.Supp. 707, or unfamiliarity with the rules, Universal Picture Corp. v. Marsh, 36 F.Supp. 241.

None of these is present here; this was simple inadvertence on the part of counsel, which has been held to be insufficient for relief from waiver. Polak v. Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland, 19 F.R.D. 87 (D.C. N.Y. 1956), and Wilson & Co. v. Ward, 1 F.R.D. 691.

Finally, long delay in applying for relief from waiver of trial by jury has influenced courts in the exercise of their discretion. See Barron & Holtzoff, supra, P. 75, and cases cited.

Despite this mass of authority which would support a holding to the contrary, this Court, acting solely in its discretion, and fully aware of the lack of support in the authorities cited, feels that the plaintiff should have the privilege of a jury, in view of the nature of the constitutional issues to be decided in the case. A jury composed of twelve members of the community at large should decide whether or not the comments at issue in this suit are of a libelous nature, not a single trial judge.

I, therefore, exercise my discretion in favor of the plaintiff and grant the motion for jury trial.

This Court at this time grants defendants' motion requesting security for costs, and sets the amount at $15,000.

If the proofs show, as defendants' counsel claimed at the hearing on the motion, that this suit was instituted for a vexatious purpose and defendants have been inhibited from speaking out since the date of the filing of the complaint in this action, then defendants will not be put to the additional burden of going to a foreign state to collect this obligation.

If the proofs do not support this claim, the only loss to plaintiff will be the costs of the bond, or the interest on the cash amount for a short period of time, either of which would be offset many times by a recovery of any magnitude.

Under these circumstances, and for the further reason that it is desirable that all matters in this case be finally resolved in this forum, I feel that the granting of this motion is well justified.

Dated: October 6, 1964.

(s) Noel P. Fox,
District Judge.

OPINION

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This is a libel action brought by plaintiff, the featured commentator on a series of television programs dedicated to informing the public on topics of national concern, against defendant League, a non-profit organization, and some of its officers and members, devoted essentially to the same purposes. The subject matter of this action consists of material contained in the December 1963 Bulletin of defendant League and in a letter of the same date to the editor of the local newspaper, each of which contained allegedly libelous remarks on plaintiff's presentation and the content of his program.

At this time the Court is presented with the difficult task of setting a time for the trial of the case, in the face of burdens and obligations on the side of both parties, which must be balanced in arriving at the decision.

The action was commenced in March of 1964, claiming $500,000 damages. The Court issued an order on May 18,

1964, directing the parties to complete all preparations for a pretrial conference by August 25, 1964. On July 15, 1964, a hearing was held on objections to interrogatories, and on September 25, 1964, a hearing was held on defendants' motion for security for costs and to deny a jury trial because of failure to give notice of the demand therefor. Immediately following these matters, the pretrial was conducted, at which plaintiff's counsel notified the Court for the first time of arrangements for a vacation commencing in mid-October and terminating in late November. At the same time, he suggested to the Court that the case be tried some time after January 1, 1965.

The dominating concern for defendants in this matter is the effect which this action has on their exercise of freedom of speech. The pendency of this suit effectively stills the voice of the defendant League of Women Voters and its individual members, and this quite conceivably prevents the free interchange of ideas in the public marketplace. Not only is the Traverse City Branch of the League silenced pro tempore, but branches of the League all over the country will doubtless proceed haltingly in speaking out on political thories advanced by those of differing political persuasions, not to mention all those who are opposed to Mr. Smoot and his particular philosophy of government. The fact that this may or may not be occasioned unintentionally is of no import, for the practical result is that he and those of like mind are free to continue speaking out, while those opposed to that line of thought are not so at liberty until the question of libel here presented is settled.

The dangers inherent in this situation have long been recognized by the courts in this land. In the case of City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N.E. 86, 90 (1923) it was said:

> "While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution."

In the recent and widely publicized case of New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, attention was once more focused on the commitment of the courts to the protection of the right to freedom of expression, no matter what form the suppression assumes. It is noteworthy that at Page 269, 11 L. Ed. 2d, at 700, the Court said:

> ". . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

And in discussing the effect of libel actions in this area the Court said at Page 278, 11 L. Ed. 2d, at 705:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."(1)

Thus, this problem must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." New York Times Co. v. Sullivan, supra, at 270, 11 L. Ed. 2d, at 701.

In the mind of this Court, the case before it presents a striking example of the importance of this freedom and calls into play the very essence of the underlying reasons supporting it. Both parties here believe that they are disseminating the political opinion so essential to a functional democracy. The need for such uninhibited opportunity of conflicting opinion has been given expression since the debates which led to the creation of our Federal Constitution.

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more

(1) It is worth noting at this point that the judgment in the state court in the Times case was $500,000, the same amount requested in the complaint in this action. How much more telling is the above quote in light of the fact that here we have not a prosperous newspaper corporation, but rather an impecunious organization which could not survive *one*, never mind a "succession of such judgments."

particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and *on the equal freedom, consequently, of examining and discussing these merits and demerits* of the candidates respectively." Madison's Report on the Virginia Resolutions, Elliot's Debates, Vol. IV, 585. (Emphasis supplied).

The language quoted in the concurring opinion of Mr. Justice Goldberg in New York Times Co. v. Sullivan, supra, is a contemporary account to the same effect, 376 U.S. 254, 297, at 302, 11 L.Ed. 2d 686, 718, at 721:

" '[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, the Right of the People (1958), p. 41".

The extent to which this need is given deference is shown by the following:

"It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved . . ." Coleman v. MacLennan, 78 Kan. 711, at 724, 98 P. 281, at 286 (1908).

Arrayed against these compelling reasons for an early trial, made more so by the approaching national elections and the need for an informed electorate, is the inconvenience which will be caused to plaintiff's counsel by forestalling a long-planned vacation.

While it is the custom of the courts to accommodate attorneys at every opportunity in matters of this kind, as

indeed the Court has done on several occasions in this very case, the facts before me regrettably do not admit of such an accommodation.

Plaintiff's counsel indicates that he had no notion that the case would be placed in the docket so quickly. However, an examination of the transcript of the hearing on July 15 clearly reveals that this Court indicated to both counsel that its docket contained a number of open dates and that it was eager to get this case into a trial posture as soon as possible.

Despite this, and despite the order of this Court that the parties be prepared for pretrial by August 25, the case being subject to call at any time subsequent to pretrial, the first notice to this Court of a rather extended vacation was given at pretrial. Considered in this light, plaintiff's counsel had a duty at the time of the July 15, hearing to give notice to the Court of his plans, and failure to do so now bars objection on that ground.

Even absent these clear evidences of intent to move the case on at any early date, the subject matter itself provides reason enough for this decision. The convenience of attorneys is always subject to their role as representatives of the individuals whose rights are at issue. In the instant case, where the determination of those rights involves a question of such paramount importance as freedom of expression, and where its exercise is effectively stifled until the outcome of the suit, this Court reluctantly denies the request to postpone the trial date, and hereby orders that this case come on for trial on October 14, 1964.

While there is a quantity of exhibits to be examined by the plaintiff, this should not present too great a burden, since it must be presumed that any commentator who speaks with authority, as Mr. Smoot does, has already investigated his topics somewhat thoroughly, and should be able to give able assistance to his counsel on these exhibits.

For the reasons stated, I am issuing an order for trial pursuant to and concurrent with this opinion.

Dated: September 28, 1964.

(s) Noel P. Fox,
District Judge.

APPENDIX C — CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

Constitutional Provision Involved

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statute Involved

28 U.S.C., Section 1920, 62 Stat. 955:

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this Title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Rules Involved

Federal Rules of Civil Procedure, Rule 41(a):

"(1) Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Federal Rules of Civil Procedure, Rule 54(d):

"(d) Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1069

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioners pray that this Court grant rehearing of its order of April 18, 1966, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above-entitled case as prayed for in the petition filed February 28, 1966, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. The granting of the writ of prohibition was an abuse of its discretion by the court below. Extraordinary writs are granted or withheld in the sound discretion of the court.

Roche v. Evaporated Milk Association, 319 U.S. 21, 25 (1943). They are not to be used as substitutes for appeal, "even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). When they are improvidently granted, this Court will act to correct the error. *Platt v. Minnesota Mining and Manufacturing Co.*, 376 U.S. 240 (1964).

In granting prohibition, the court below ruled on the question of the power of the district court. It held that a federal district judge has *no power, in any circumstances*, to allow counsel fees as costs in actions at law. Petitioners submit that this holding is erroneous. Petitioners further submit that such a rule, which reintroduces into federal courts law a significant distinction between law and equity, should not be established through the back door of an extraordinary writ. In *Ex parte Fahey*, 332 U.S. 258 (1947), which involved a questionable award of counsel fees by one judge of a three-judge court, this Court refused to grant a writ of prohibition and mandamus, ruling that appeal was the appropriate remedy. Petitioners submit that the same reasoning requires reversal of the decision of the court below.

2. Recent decisions have applied the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), broadly in order to safeguard free and open debate on public issues.[1] These cases have recognized that debate may be stifled by the successful prosecution of a libel suit. Petitioners urge that debate is also stifled by the mere institution of a libel suit.[2] Indeed, the cost of defense may exceed most libel recoveries.

In *Rosenblatt v. Baer*, 86 S.Ct. 669 (1966), this Court described the tension between the values nurtured by the First and Fourteenth Amendments and the social values

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1 *Walker v. Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965); *Gilberg v. Goffi*, 251 N.Y.S. 2d 823 (1964), *aff'd*, 260 N.Y.S. 2d 29, 207 N.E. 2d 620 (1965); *Pauling v. National Review Inc.*, 34 U.S.L. Week 2575 (N.Y. Sup. Ct., April 21, 1966) (Silverman, J.).

2 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), where the Court refers to the deterrent effect of the "fear of the expense of having to" defend against a libel suit.

underlying the law of defamation. Whatever social values may underlie the law of defamation, however, there are none supportive of groundless and vexatious, as opposed to good faith, libel litigation. In such a case, a new balance must be struck further along the scale, and defendants who are wrongfully brought into court and caused great expense must receive some compensation. This case, in its present posture, does not require the Court to decide exactly where the balance should be struck, for there is no factual record before the court. Petitioners contend only that in an appropriate case the district court must have the power to tax extraordinary costs against a vexatious libel plaintiff. The existence of such power is constitutionally required.

3. The traditional American policy of free access to the courts[3] does not justify the decision of the court below. That policy must be balanced against the policy favoring protection of First Amendment rights. The district court may give correspondingly less weight to the free access policy, depending on the extent to which a suit is shown to have been groundless and vexatious, and correspondingly greater weight to protection of First Amendment rights, according to the extent to which the pendency of the suit stifled debate. The district court must have the power to allow extraordinary costs if it finds that the harm done to First Amendment rights by failure to award such costs outweighs the hindrance that such an award presents to free access to the courts.[4] The court below has ruled flatly that the district court has no such power (except in equitable proceedings). This holding amounts to a mechanical rendering of what must, by its nature, be a delicate balancing test. Petitioners submit that the court below is in error.

4. State law has no relevance in determining whether or not a district judge has the power to allow counsel fees as costs. The award of costs is governed by Rule 54(d) of the Federal Rules of Civil Procedure. Under *Hanna v. Plumer*,

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3 See *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964).

4 That such a balance may produce different results in defamation cases than in others need not be disturbing. On exactly the same policy grounds it has long been held that equity will not enjoin a libel whereas it will enjoin the commission of other torts.

380 U.S. 460 (1965), federal courts law alone governs the interpretation and application of this rule.

Even if the award of costs were not governed by a federal rule, *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), would still dictate recourse to federal courts law rather than state law. The award of extraordinary costs is intimately connected with the administration of legal proceedings, "an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules." *Lumbermen's Mutual Casualty Co. v. Wright,* 322 F.2d 759, 764 (5th Cir. 1963).[5]

5. This question continues to be of great public importance. The *Times* case has not slowed the institution of good faith libel actions by public figures who are sensitive of criticism[6] and it will not hinder the filing of vexatious actions either. Denial of certiorari will leave the Sixth Circuit's ruling as the only law upon the subject. Petitioners, and groups and individuals similarly situated, will be forced to water down or cease their commentary on public matters whenever confronted by a figure who threatens a groundless suit. The holding of the court below will be a mandate for oppressive litigation unless it is corrected promptly.

5 See also *Monarch Insurance Co. v. Spach,* 281 F.2d 401 (5th Cir. 1960); *Odekirk v. Sears Roebuck & Co.,* 274 F.2d 441, 445 (7th Cir.), *cert. denied,* 362 U.S. 974 (1960); *Conte v. Flota Mercante Del Estado,* 277 F.2d 664, 672 (2d Cir. 1960) (Friendly, J.) (award of counsel fees governed by federal courts law).

6 See, *e.g.*, cases cited in Note 1 *supra.*

CONCLUSION

Petitioners are fully aware that petitions for rehearing are viewed with disfavor by the Court. However, petitioners believe that this case, in which the decision of the court below seriously imperils valuable constitutional rights, is of no less importance than others, now recognized as landmarks, in which rehearing was granted following a denial of certiorari.[7]

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Dated: May 4, 1966.

Respectfully submitted,

HAROLD S. SAWYER

LEWIS A. ENGMAN

CHARLES E. MCCALLUM

Counsel for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

HAROLD S. SAWYER

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7 See, *e.g.*, Hickman v. Taylor, *cert. denied*, 327 U.S. 808 (1946), *rehearing granted and cert. granted*, 328 U.S. 876 (1964), *decision on merits*, 329 U.S. (1947).